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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITY OF FRESNO, Plaintiff and Respondent, v. DANIEL W. GREEN et al., Defendants and Appellants.	F037459 (Super. Ct. No. 00CECG10562) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

Motschiedler, Michaelides & Wishon and James A. McKelvey for Defendants and Appellants.

Hilda Cantú Montoy, City Attorney, Michael P. Slater, Anthony W. Cresap, and Kathryn C. Phelan, Deputy City Attorneys, for Plaintiff and Respondent.

Plaintiff City of Fresno (City) sought a preliminary injunction to prohibit defendants Daniel and Sharon Green (collectively, the Greens) from operating a wood recycling business on a four-acre parcel of land. City claimed the wood recycling business was an industrial activity that violated municipal zoning ordinances. The Greens asserted equitable defenses, principally that they had acted upon the advice and consent of City in acquiring, developing and using the property in question. The superior court granted the preliminary injunction, ruling City would likely prevail on the merits of its claim and found, in relevant part, the Greens could not prevail on any equitable defense because City's actions upon which the Greens relied were "invalid." The court also determined municipal zoning ordinance prohibited the Greens from using the "R-A" ("Single Family Residential-Agricultural District") portion of their land for industrial purposes.

The Greens appeal the order granting the preliminary injunction. First, the Greens contend City was not likely to prevail on the merits because the equitable defenses of laches and estoppel are viable defenses to City's action. Second, the Greens contend City failed to prove it would suffer irreparable harm if the court denied the preliminary injunction. Third, the Greens argue the trial court failed to properly weigh the relative degree of harm the parties would suffer.

We determine the superior court erroneously concluded as a matter of law that the invalidity of City's actions upon which the Greens claim reliance foreclosed any possible equitable defense raised by the Greens. We reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

The Greens own and operate Dan Green's Wood Recycling business in the City of Fresno. The business operates at a 14-acre site on the southeast corner of Hughes Avenue and Whitesbridge Road. The site consists of three parcels of land -- two to the northeast and one eight-acre parcel to the west. The two parcels to the northeast are

zoned “M-1” (“Light Manufacturing District”), which permits industrial uses such as the Greens'. City concedes that the Greens may operate their business on the two northeast parcels without violating city zoning restrictions.

The subject of this litigation is the eight-acre parcel to the west. The northern half, comprising approximately four acres, is zoned M-1 which permits light industrial uses such as the Greens'. The southern half, also comprising about four acres, is zoned R-A. The R-A district is “intended to provide for the development of one family residential estate homes in a semi-rural environment”; uses permitted include the keeping of specified livestock and “[a]gricultural crops, greenhouses, fruit trees, nut trees, vines, nurseries for producing trees, vines and other horticultural stock.” (Fresno Mun. Code, §§ 12-206 & 12-206.1.)

In spring 1999, both orally and in writing, then City Development Director Alvin Solis determined the site was suitable for the operation of a wood recycling business. On May 21, 1999, Heather Collier of the City Development Department (Development Department) wrote a letter to the Greens in which she stated the Development Department had approved the Greens’ plan to develop a wood storage facility on the land. The approval included certain conditions.

Solis approved a report, dated July 7, 1999, in which the staff of the planning division of the Development Department confirmed the finding that the Greens could properly operate their wood grinding and storage facility on both the M-1 and R-A portions of the property. The report was prepared for submission to the City Planning Commission (Planning Commission). At page 3, the report states: “Both zone districts [M-1 (light industrial) and R-A (residential-agricultural)] allow the property to be utilized as proposed as a wood grinding and storage facility.” At page 4, the report concludes: “There are no odors associated with the grinding and chipping of wood

products and, since there is no composting permitted on the site, odor, rodents and insects will not be a problem associated with the wood storage facility."

On August 20, 1999, the Development Department prepared a "Negative Declaration" which was filed with the city clerk on August 24, 1999. Prepared by Collier and submitted by the Development Department's planning manager Rayburn R. Beach, the declaration concluded that the Greens' proposed use of the property would not produce any significant adverse environmental effects.

In September 1999 the Greens purchased the 14-acre site in reliance upon City's representations. The Greens state they expended considerable time, effort, and money repairing existing buildings and developing the landscaping on the property. In accordance with City's requirements, they moved grinding equipment to the property and had it tested by noise experts. They also installed water lines, fire hydrants, and other safety improvements to meet the requirements set forth by City and commenced their wood recycling and storage operations on the property.

On June 29, 2000, the city attorney issued an opinion letter which concluded that former Development Director Alvin Solis erred by ruling that the Greens could properly operate a wood recycling and storage facility on their R-A zoned land. The author of the opinion letter, Deputy City Attorney Anthony W. Cresap, stated at page 1: "Storage of wood waste, mulch, wood chips and other materials generated in connection with a wood waste processing facility is akin to an industrial use that is prohibited in the R-A district." The Greens were so notified and asked to cease this operation on the R-A zoned land.

Based on this opinion letter, City commenced its action, which in relevant part sought to permanently enjoin the Greens from using the questioned property in "violation of Fresno Municipal Code Section 12-206.2." At the hearing on the City's motion for preliminary injunction, evidence was adduced including what follows.

Every day, from various sources, the Greens' business receives yard and landscaping waste, tree bark, branches, and scrap building material. The material is hauled in by truck and stored temporarily in large piles. When it is time for processing, the material is placed into a grinder-chipper machine, which reduces the material to chips or mulch. According to the declaration of Sharon Green, this initial storage and processing takes place exclusively on the M-1 zoned portions of the Greens' property. After it has been processed, the chips or mulch is stored on and then sold from the R-A zoned portion of the land. Buyers use the material for groundcover, landscaping, and dairy bedding.

Located across the street and to the south of the Greens' R-A zoned land is property zoned "R-1" ("Single Family Residential District"), and used for single-family residences. A number of residents who live in the vicinity of the business complained regarding strong, unpleasant odors and large quantities of dust allegedly generated by the Greens' business. Three individuals who live in the vicinity of the business submitted sworn declarations in support of the City's motion for preliminary injunction. Those three individuals were Mary Ochoa, Harlan Kelly, and Floyd Harris, Jr.

Mary Ochoa, who lives in the vicinity, states in her declaration: "Since Dan Green's Recycling facility has been in operation, I have observed strong and unpleasant odors emanating from the recycling facility; large quantities of dust covering the immediate vicinity; and, ammonia fumes originating from the facility. I have also observed activity during the middle of the night and strong odors of ammonia coming from the piles of humus at the facility."

Attached to Ochoa's declaration is a purported petition signed by 36 other individuals with whom Ms. Ochoa states she "personally discussed the nuisance conditions created by Dan Green's Recycling facility." The purported petition lists

the names and addresses of each person signing and essentially states the same concerns as set forth in Ochoa's declaration.

The declaration of Floyd Harris, Jr., makes the same allegations as Ochoa, using identical language. Attached to his declaration are the names and addresses of 120 other individuals who allegedly share the same concerns. In his declaration, Harlan Kelly likewise raises the same allegations. Again he uses language identical to that contained in Ms. Ochoa's declaration. Attached to Mr. Kelly's declaration are the names and addresses of 35 persons who allegedly have similar complaints about the Greens' business.

(At the hearing on the motion for preliminary injunction, the Greens objected to all of the attachments to the three declarations as inadmissible hearsay.)

In her opposition to the motion for preliminary injunction, Sharon Green pointed to the July 7, 1999, planning division staff report, which concluded the grinding and chipping of wood products do not generate any odors.

Sharon Green denies the business has been composting. Regarding noise, in her declaration, she responds the business routinely ceases operations at 5:00 p.m. each evening. "Neither my husband nor I, nor any of our employees, have ever been on the property after 5:30 p.m. Any noise or other activity observed on the property after 5:30 p.m., if such actually occurred, would be attributable to thieves or trespassers."

On July 15, 1999, prior to opening the business, the Greens had the grinding equipment tested by noise experts, in compliance with an environmental impact statement. The expert determined that the noise level the machines produced was well under the level permitted by the Fresno County noise ordinance for residential areas. On August 24, 1999, the Development Department filed an initial study to review the Greens' 1999 site plan application. According to the study and according

to the noise expert's report, the expert measured the sounds generated by the grinder from a point 400 feet away. The machine's average noise level was measured at 50.8 decibels. To put that measurement in context, the noise level of a library is about 40 decibels and that of conversational speech approximately 60 decibels. According to the Development Department's initial study, the expert's report probably overestimated the noise level generated by the grinder machine, because the report did not take into account the fact that, at the actual site, a 10-foot-high metal wall would mitigate the noise.

Sharon Green attributes the dust and odors to nearby farming operations. For example, when the farmers in the area perform work in nearby vacant fields, she has noticed dust from the farmland blowing over her property.

In 1999, the City required the Greens to construct a water line, backflow prevention device, and hose bibs on the property for purposes of fire suppression and dust control. On July 10, 2000, the City issued permits allowing the Greens to commence the work. The Greens paid over $3,000 to complete the work, whereupon City inspectors checked it and approved it. Sharon Green states the water system and dust control measures she had installed at the City's behest mitigates the problem even if the Green's property has contributed to dusty conditions in the past. These permits and inspection approvals were issued after the June 29, 2000, opinion letter from the city attorney.

According to Sharon Green, declarants Mary Ochoa, Floyd Harris, Jr., and Harlan Kelly reside, respectively, .6 miles, 1.9 miles, and 3.9 miles southeast of the southern boundary of her property. In her declaration, Green alleges these individuals had experienced problems with the operator of a nearby wood recycling business, called Weaver's Tree Service, and were therefore determined to force the Greens to relocate their business. These three individuals, Green states, have filed repeated

complaints with various officials of the City, the County of Fresno, and the San Joaquin Valley Air Pollution Control District (APCD). But despite repeated inspections, the agencies have prepared reports finding no violations. The Greens had received no notice or citation from any agency.

Five documents attached to Ms. Green's declaration purport to be official inspection reports prepared by the Fresno County Department of Community Health. An inspector went out to the Greens' property on at least five separate occasions in response to telephone complaints, but the inspector could find no health violations. On May 26, 2000, the inspector received an anonymous call regarding odors and flies, but visited the Greens' property and found no odors or flies.

On June 22, 2000, the same inspector received a telephone call from declarant Harlan Kelly complaining about "terrible odors" coming from the Greens' property. The inspector concluded "it would be almost impossible for him [Mr. Kelly] to detect odors based on his location and the wind direction." The inspector agreed to visit the site, but asked Mr. Kelly to provide "an exact location of where he is detecting any odors and the wind direction." The inspector visited the Greens' property again, and again he detected "no offsite or onsite odors."

On July 28, 2000, the health inspector received a complaint from Fresno Auto Auction saying that flies were coming from the Greens' business. The inspector investigated and found "almost no flies at the facility." The inspector referred the complaint to the City's code enforcement department as the complaint seemed to involve land use issues.

The health inspector again received a complaint on August 3, 2000. The complainant, who operated a business located at 315 North Marks Avenue, claimed the Green's business was bringing in manure and that he could not even open up his

doors because of the flies. The inspector visited the site and again found almost no flies on the Greens' property.

On September 20, 2000, the health inspector received a call from John Schroeder, with APCD, informing him that a APCD inspector was being sent out. Together the health inspector and the APCD inspector visited the Greens' property. They both agreed they could detect no odors.

The motion for preliminary injunction, based upon declarations and points and authorities submitted to the superior court, was argued on November 14, 2000. On January 11, 2001, the court filed its order, which included the granting of the motion for a preliminary injuction as to City's zoning violation claim and the enjoining of the Greens "during the pendency of this action from processing, storing, or selling, chips, mulch, or other wood products on that portion of the subject property which is zoned R-A." Relevant to the discussion that follows, the court's order included the following: "The cases [involving equitable estoppel] turn on the question of whether the building permit or other action was valid in the first instance. Where the action is initially valid, a public entity may be barred by estoppel from changing the action. However, where, as here, the action was initially invalid, estoppel or other equitable remedies may normally not be invoked. [*Pettitt* v. *City of Fresno* (1973) 34 Cal.App.3d 813, 824.] Here, as it has already been determined that any action by plaintiff's development director was not valid, an estoppel or other equitable remedy will not lie."

DISCUSSION

I. Standard of Review

On an appeal taken from the issuance of a preliminary injunction, we review the superior court's *pure* findings of fact for an abuse of discretion. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109.) As a general rule, the burden is on

appellants, as the party challenging the factual findings, to make a clear showing of abuse of discretion. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69.) Therefore, as to pure issues of fact, the Greens have the burden to show that the trial court abused its discretion.

But where pure questions of law govern the outcome, our standard of review is far less deferential and we review de novo any question of statutory interpretation. (*Garamendi v. Executive Life Ins. Co.* (1993) 17 Cal.App.4th 504, 512.) "Ordinarily, an order granting or denying a preliminary injunction or granting or denying a motion to dissolve an injunction is reviewed under the abuse of discretion standard. [Citation.] However, where the grant or denial of a preliminary injunction is dependent upon construction of a statute, and the matter is purely a question of law, the standard of review is not whether discretion was appropriately exercised, but whether the statute was correctly construed." (*Ibid*.) Also, to the extent we interpret provisions of the Fresno Municipal Code, we are presented with a question of law. (*Berry v. City of Santa Barbara* (1995) 40 Cal.App.4th 1075, 1082.)

Similarly, our review of a superior court finding is also far less deferential when we are faced with mixed questions of law and fact. (*Ali v. City of Los Angeles* (1999) 77 Cal.App.4th 246, 250 [whether the city's actions toward the owner of a hotel constituted a taking of his property presented a mixed question of law and fact].) "Mixed questions of law and fact involve three steps: (1) the determination of the historical facts--what happened; (2) selection of the applicable legal principles; and (3) application of those legal principles to the facts. The first step involves factual questions exclusively for the trial court to determine; these are subject to substantial evidence review; the appellate court must view the evidence in the light most favorable to the judgment and the findings, express or implied, of the trial court."

(*Ibid*.) "Only the second and third steps involve questions of law for our de novo review." (*Ibid*.)

In determining whether defendants would likely prevail at a trial by raising the equitable defenses of estoppel, laches, or waiver, we are presented with a mixed question of law and fact. (*Evju v. Barbers' Union, Local 134* (1939) 36 Cal.App.2d 86, 87 [where decedent was a union official and had agreed to take a pay cut due to a decrease in union funds, the question of whether equitable estoppel barred his estate from suing to recover back wages was a mixed question of law and fact]; *Zenos v. Britten-Cook Land Etc. Co.* (1925) 75 Cal.App. 299, 307 [where a corporation sued to invalidate a mortgage, which the corporation's officers had approved in writing, the question of whether the defendant could raise the defense of estoppel was a mixed question of law and fact].)

II. Requirements for a Preliminary Injunction

To obtain a preliminary injunction in the lower court, a plaintiff must prove: (1) a reasonable probability the plaintiff would prevail on the merits; (2) the harm to the plaintiff from denying the preliminary injunction outweighed the harm to the defendants from imposing the preliminary injunction; and (3) the plaintiff would suffer irreparable harm if the preliminary injunction were not granted. (*Trader Joe's Co. v. Progressive Campaigns, Inc.* (1999) 73 Cal.App.4th 425, 429.) The court must deny the preliminary injunction if there is a substantial conflict in the evidence presented by the opposing parties. (*London v. Marco* (1951) 103 Cal.App.2d 450, 452-453.)

The plaintiff must show by evidence admissible in open court that, pending a trial on the merits, the defendants should be restrained from exercising the right claimed by them. *(People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 21.) In ruling on the motion, the court may not consider those portions of the supporting declarations that consist of hearsay statements. (*Ibid*.)

Some of the plaintiff's burden to establish the above requirements is shifted to the defendant when the plaintiff is a governmental entity seeking to enjoin the alleged violation of a zoning ordinance that specifically authorizes injunctive relief. Here, as City points out, the city zoning ordinances contain provisions that specifically authorize the director of the City of Fresno Division of Resources to enforce any violation of the ordinances by obtaining an injunction in civil court. (Fresno Mun. Code, §§ 1-401; 1-404(d); 12-411 (B) & (C); see Civ. Code, §§ 3490-3494.)

In *IT Corp. v. County of Imperial*, *supra*, 35 Cal.3d at pages 72-73, a governmental entity was seeking to enjoin the alleged violation of a zoning ordinance that specifically authorized injunctive relief as a remedy. In the context of a zoning dispute, the California Supreme Court modified the traditional test for determining whether to grant a preliminary injunction. The court wrote: "Accordingly, the propriety of an injunction must be judged by the following standard. *Where a governmental entity seeking to enjoin the alleged violation of an ordinance which specifically provides for injunctive relief establishes that it is reasonably probable it will prevail on the merits, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant*. If the defendant shows that it would suffer grave or irreparable harm from the issuance of the preliminary injunction, the court must then examine the relative actual harms to the parties.

"Once the defendant has made such a showing, an injunction should issue only if -- after consideration of both (1) the degree of certainty of the outcome on the merits, and (2) consequences to each of the parties of granting or denying interim relief -- the trial court concludes that an injunction is proper. At this stage of the analysis, no hard and fast rule dictates which consideration must be accorded greater weight by the trial court. For example, if it appears fairly clear that the plaintiff will prevail on the merits, a trial court might legitimately decide that an injunction should

issue even though the plaintiff is unable to prevail in a balancing of the probable harms. On the other hand, the harm which the defendant might suffer if an injunction were issued may so outweigh that which the plaintiff might suffer in the absence of an injunction that the injunction should be denied even though the plaintiff appears likely to prevail on the merits." (Italics added, fn. omitted.)

III. The Greens' Equitable Defenses

The superior court determined there is a strong likelihood City will prevail because (1) the Greens' use of the subject property is prohibited in the R-A district and (2) the Greens' assertion that City should be barred from preventing their continued use by virtue of equitable estoppel is foreclosed by law. Concerning this latter point, the trial court failed to properly perform the balancing test described in *IT Corp.* v. *County of Imperial, supra*, 35 Cal.3d at pages 72-73 when it dispositively concluded "an estoppel or other equitable relief will not lie" because City's actions, upon which the Greens relied, were invalid.

The California Supreme Court has squarely held that a party may raise the defense of equitable estoppel to defeat an action by the government if the traditional elements of estoppel are satisfied and sufficient injustice would result to justify an effect upon public policy. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496-497 (*Mansell*).) "[W]e have concluded that the proper rule governing equitable estoppel against the government is the following: The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*Ibid.*)

Mansell did not limit itself to situations where the initial governmental act was valid. To the express contrary, the Supreme Court made it clear that equitable estoppel may apply to invalid acts. "The issue, stated bluntly, is this: When the state acting both directly and through its subtrustee the city, conducts itself relative to public trust lands in a manner which would estop it from asserting paramount title if it were a private person, can it be bound by a similar estoppel--even when the effect thereof would be to quiet title to such trust lands in private persons in the face of an express constitutional provision forbidding the alienation of such lands?" (*Mansell*, *supra*, 3 Cal.3d at p. 493.) The Supreme Court answered yes.

Relying on *Pettitt v. City of Fresno*, *supra*, 34 Cal.App.3d 813, the superior court here held, as a matter of law, that the doctrine of equitable estoppel does not apply where a defendant has relied to his detriment upon a governmental act which was illegal or outside the government's power to do. As the Supreme Court emphasized in *Mansell*, *supra*, 3 Cal.3d at pages 496-497, a party is not so foreclosed. Instead, whether the government had exceeded its powers is merely one factor in the analysis. (*Id*. at p. 497.) It is still necessary for the court to balance the competing equities involved.

Mansell involved disputes between the state and private landholders concerning the ownership of highly desirable land along the coast of Long Beach. (*Mansell*, *supra*, 3 Cal.3d at p. 473.) In an effort to resolve the title dispute, the state entered into various settlements whereby it agreed to transfer to the private landowners five acres of public coastal property. In exchange, the city and state would receive 8.5 acres of private property that abutted public trust facilities and could therefore be used more effectively by the city and state. (*Id*. at p. 477.) The city and state did not have the power to enter into this accommodation agreement, because the California Constitution expressly prohibited the transfer of public tidelands to private hands. (*Id*.

at pp. 478-479, 486-487.) Nevertheless, the court held that the conduct of the city and the state was tantamount to fraud, in that both government entities had been aware of the disputes for some length of time between 50 and 100 years and had taken no steps to resolve them. (*Id*. at pp. 491-492.) And the city and state had induced thousands of private homeowners to settle on the affected lands to their detriment. (*Id*. at p. 499.) Against this significant and pervasive harm to private landowners, the court found that there was minimal harm to the public interest given the small amount of land conveyed and given the land's limited usefulness as tidelands. (*Id*. at p. 500.)

Similarly, in *City of Imperial Beach v. Algert* (1970) 200 Cal.App.2d 48 (*Algert*), the government agency tried to perform an act that was outside its power, yet the Court of Appeal implicitly balanced the competing equities and held the government agency was estopped from rescinding its illegal act. The Court of Appeal's analysis in *Algert* was cited with approval by the California Supreme Court in *Mansell*, *supra*, 3 Cal.3d at pages 495 and 498. In *Algert*, a county subdivision map designated a particular property for use as a public street, but the developer blocked it off and never opened it up for use as a street. (*Mansell*, *supra*, at p. 495.) The county board of supervisors voted to treat the property as private property whereupon it was taxed. When the owner failed to pay the taxes, the land was sold to defendant. A city ordinance later zoned the land for residential use. The county board of supervisors tried to vacate the order, which it had issued 10 years earlier and which had closed the property to street traffic. The Court of Appeal upheld the trial court's ruling that the city was estopped from treating the land as a public street. (*Ibid*.)

As in *Mansell* and *Algert*, the question of whether the Greens may raise the defense of equitable estoppel must be made on an individual basis, by balancing the competing equities involved. "The courts of this state have been careful to apply the rules of estoppel against a public agency only in those special cases where the interests

of justice clearly require it. [Citations.] However, if such exceptional case does arise and if the ends of justice clearly demand it, estoppel can and will be applied even against a public agency. Of course, the facts upon which such an estoppel must rest go beyond the ordinary principles of estoppel and each case must be examined carefully and rigidly to be sure that a precedent is not established through which, by favoritism or otherwise, the public interest may be mulcted or public policy defeated." (*Algert, supra*, 200 Cal.App.2d at p. 52.)

We might add that we do not read as much into this court's opinion in *Pettitt v. City of Fresno, supra,* as did the superior court in making its ruling and as does City in citing *Pettitt*. The *Pettitt* court was bound by the state's high court holding in *Mansell*, which it cites approvingly in acknowledging the balancing test that must be performed in these matters. (*Pettitt v. City of Fresno, supra,* 34 Cal.App.3d at p. 820.) The facts there included the Pettitts' alterations to their property exceeded the scope of an initial building permit. (*Id*. at p. 817.) In reaching its decision, the appellate court factored in the invalidity of that initial permit and on balance found the Pettitts did not prevail on their claim of equitable estoppel, noting that certain specified cases cited by the Pettitts concerned valid permits, distinguishing the cases from the one before it. (*Id.* at pp. 823-824.) This is a far cry from establishing a rule of law that equitable relief will not lie in the case of a party relying on invalid governmental acts.

While it may be true that City, acting through its former Development Director Al Solis, erred when it gave the Greens its initial approval to purchase the property and open a wood recycling business on R-A zoned land, the inquiry does not end there. As discussed above, under certain circumstances a defendant may successfully assert the government is equitably estopped from gaining injunctive relief even if the defendant's reliance is upon an illegal or improper action by the government agency. However, it is not for us to weigh the evidence of relevant factors outlined by the case

law; that will be the duty of the superior court in further proceedings concerning preliminary and/or permanent injunctive relief.

DISPOSITION

The order granting preliminary injunction in favor of City is reversed. The matter is remanded to the superior court for further proceedings consistent with this opinion. The Greens are awarded their costs on appeal.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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BUCKLEY, J.

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CORNELL, J.